

Honorable James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BARBARA ROBINSON,

Plaintiff,

v.

WELLS FARGO BANK NATIONAL  
ASSOCIATION, AS TRUSTEE FOR THE  
CERTIFICATE HOLDERS OF THE MLMI  
TRUST, MORTGAGE LOAN ASSET-BACKED  
CERTIFICATES, SERIES 2005 WMC2;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.; NATIONSTAR MORTGAGE  
LLC; JAY BRAY; AZTEC FORECLOSURE  
CORPORATION OF WASHINGTON

Defendants.

Case No. 2:17-cv-00061 JLR

OPPOSITION TO PLAINTIFF'S MOTION  
TO INTERVENE AND ORDER  
DISMISSING ALL DEFENDANTS'  
MOTIONS FOR DISMISSAL FOR LACK  
OF STANDING

(SUBMITTED BY DEFENDANTS  
WELLS FARGO BANK NATIONAL  
ASSOCIATION, AS TRUSTEE FOR THE  
CERTIFICATE HOLDERS OF THE MLMI  
TRUST, MORTGAGE LOAN ASSET-  
BACKED CERTIFICATES, SERIES 2005  
WMC2; NATIONSTAR MORTGAGE  
LLC; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.; AND  
JAY BRAY)

**OPPOSITION**

Defendants Wells Fargo Bank National Association, As Trustee for the Certificate  
Holders of the MLMI Trust, Mortgage Loan Asset-Backed Certificates Series 2005 WMC2  
("Wells Fargo"), Mortgage Electronic Registration Systems ("MERS"), Nationstar Mortgage  
LLC ("Nationstar"), and Jay Bray (collectively, the "Opposing Defendants"), object as follows  
to Plaintiff's Notice of Motion to Intervene and Order Dismissing all Defendants' Motions for

OPPOSITION TO PLAINTIFF'S MOTION TO INTERVENE AND  
ORDER DISMISSING ALL DEFENDANTS' MOTIONS FOR  
DISMISSAL FOR LACK OF STANDING; Case No. 2:17-cv-00061 JLR  
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Dismissal for Lack of Standing (Dkt. No. 24); and Memorandum to Support Order Dismissing All Defendants' Motions for Dismissal for Lack of Standing (Dkt. No. 24-1 (together, the "Motion")).<sup>1</sup>

### POINTS AND AUTHORITIES

The arguments in Plaintiff's Motion have no merit and find no support in the law.<sup>2</sup> Plaintiff argues: (1) that Washington's Deeds of Trust Act is an unconstitutional bill of attainder; (2) that Opposing Defendants' counsel does not have standing to represent Opposing Defendants; and (3) that the court should strike defendants' motions to dismiss because statements of counsel are not evidence. These arguments are incorrect and her motions should be denied.

#### **A. *The Deeds of Trust Act is Not an Unconstitutional Bill of Attainder; This Court May So Rule Without Respect to Intervention By the Attorney General.***

Although Plaintiff's apparent request to intervene in her own action seems unusual at first blush, it appears upon review to stem from a misapprehension of Fed. R. Civ. P. 5.1. Under that rule, a party that files a pleading, motion, or other paper drawing into question the constitutionality of a state statute must file a notice so stating, and must serve the notice and the paper raising the constitutional question on the state attorney general. *See* Fed. R. Civ. P. 5.1(a). The attorney general then has the option to intervene in the action within 60 days of the notice. *See id.* at subsec. (c). The court may not issue a final judgment holding the statute unconstitutional before the 60 days have elapsed, but it may reject the constitutional challenge at any time. *See id.*

Here, Plaintiff asserts that the Deeds of Trust Act is a bill of attainder, and thus repugnant to the federal and state constitutions. *See* Motion (Dkt. No. 24), at p. 3. That assertion is

<sup>1</sup> Plaintiff also filed a Declaration in Support of Notice of Motion to Intervene and Order Dismissing All Defendants' Motions for Dismissal for Lack of Standing (Dkt. No. 25), although the document lacks any statements of fact.

<sup>2</sup> Note that the Motion appears to be cribbed almost entirely from a faux article available online at: [http://www.academia.edu/12404931/The\\_Deeds\\_of\\_Trust\\_Act\\_As\\_A\\_Bill\\_of\\_Attainder](http://www.academia.edu/12404931/The_Deeds_of_Trust_Act_As_A_Bill_of_Attainder).

incorrect. A bill of attainder is a “special legislative act prescribing punishment, without a trial, for a specific person or group.” Black’s Law Dictionary 176 (8th ed. 2004). Historically, bills of attainder were passed by the English parliament in order to sentence to death persons who had attempted to overthrow the government. *See U.S. v. Brown*, 381 U.S. 437, 441–42 (1965) (tracing history of bills of attainder). In modern American constitutional usage, the prohibition on bills of attainder is an implementation of the principle of separation of powers, preventing the legislature from exercising judicial authority. *See id.* at 442. A legislative act is thus an impermissible bill of attainder only where the act “determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977).

Washington’s Deeds of Trust Act does not fit the bill and no court has ever even suggested that the Deeds of Trust Act could be considered a bill of attainder. To the contrary, Washington’s Supreme Court has specifically upheld the Deeds of Trust Act against a constitutional due process challenge. *See Kennebec, Inc. v. Bank of the West*, 88 Wn. 2d 718 (1977). In *Kennebec*, the court noted that nonjudicial foreclosure of a deed of trust is simply a function of the parties’ private agreement, which was recognized at common law. *See id.* at 724. The court further observed that the Deeds of Trust Act merely regulates the manner of operation of contractual provisions authorizing nonjudicial foreclosure, and further does so “almost solely for the protection of the debtor.” *See id.* at 725.

For these reasons, the Deeds of Trust Act cannot reasonably be contended to be an unconstitutional bill of attainder. It does not determine guilt, does not inflict punishment, and does not single out an individual or identifiable group. Rather, it simply regulates the operation of power of sale clauses in private deeds of trust, to the extent parties include such clauses in their agreements. Plaintiff’s Motion advances no argument to seriously contend otherwise. This Court should accordingly reject Plaintiff’s constitutional challenge to the Deeds of Trust Act.

Under Fed. R. Civ. P. 5.1(c), the Court can and should do so immediately, without waiting for Washington's Attorney General's decision whether to intervene.

**B. *Counsel Properly Represents the Opposing Defendants In This Action.***

Plaintiff's arguments on the point are difficult to follow, but she appears to assert that the undersigned attorneys in this case are foreign agents for purposes of the Foreign Agents Registration Act, and must accordingly file with the Court proof of their right to represent Opposing Defendants. *See* Dkt. No. 24-1, p. 8. But the Foreign Agents Registration Act does not impose any such requirement. Instead, it requires agents who lobby in the United States on behalf of foreign principals to disclose their affiliation. *See, e.g., Attorney General of United States v. Irish Northern Aid Committee*, 530 F. Supp. 241, 245 (S.D.N.Y. 1981) ("The general purpose of the Act is to protect the security and foreign relations of this country by requiring agents of foreign principals to identify themselves and disclose their activities."). The statute has no bearing on this lawsuit.

**C. *Opposing Defendants' Motion to Dismiss Is Based on the Deficiency of Plaintiff's Pleading, Not the Statements of Counsel.***

Plaintiff finally asserts an argument that boils down to a contention that Opposing Defendants' motion to dismiss Plaintiff's amended complaint should be denied because statements by counsel are not evidence.<sup>3</sup> That argument misunderstands the nature of a Fed. R. Civ. P. 12(b)(6) motion to dismiss directed against the sufficiency of a pleading. The issue at this stage is not what evidence has been adduced, but rather whether Plaintiff's amended complaint sufficiently states a claim for relief under the familiar *Twombly/Iqbal* standard. That is a purely legal question limited to the face of the pleading without respect to outside evidence.

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<sup>3</sup> Other than Plaintiff's Notice of Motion to Intervene and Order Dismissing All Defendants Motions for Dismissal and Lack of Standing, Plaintiff did not file an Opposition to the Motion to Dismiss submitted by Defendants Wells Fargo Bank, National Association, As Trustee for the Certificate Holders of the MLMI Trust, Mortgage Loan Asset-Backed Certificates Series 2005 WMC2, Mortgage Electronic Registration Systems, Nationstar Mortgage LLC, and Jay Bray.

1 Plaintiff's Amended Complaint fails to plead any claim for relief and fails as a matter of  
2 law to show any reason that foreclosure should not proceed or that any defendants have acted  
3 wrongfully in any way. Accordingly, the action should be dismissed with prejudice as against  
4 Wells Fargo, MERS, Nationstar, and Jay Bray.

5 **CONCLUSION**

6 Plaintiff's Motion lacks any basis in fact or law and should be denied.

7  
8 DATED this 4th day of May, 2017.

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20 *Of Attorneys for Defendants Wells Fargo Bank*  
21 *National Association, As Trustee For The*  
22 *Certificate Holders of the MLMI Trust, Mortgage*  
23 *Loan Asset-Backed Certificates, Series 2005*  
24 *WMC2, Nationstar Mortgage LLC, Mortgage*  
25 *Electronic Registration Systems, Inc., and Jay Bray*  
26

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing OPPOSITION TO PLAINTIFF'S MOTION TO INTERVENE AND ORDER DISMISSING ALL DEFENDANTS' MOTIONS FOR DISMISSAL FOR LACK OF STANDING (SUBMITTED BY DEFENDANTS WELLS FARGO BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF THE MLMI TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2005 WMC2, NATIONSTAR MORTGAGE LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND JAY BRAY)

to be served on the following person[s]:

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*Attorneys for Defendants Mortgage Electronic Registration Systems, Inc., and Bank of America, N.A.*

by causing the document to be delivered by the following indicated method or methods:

☒ by CM/ECF electronically mailed notice from the Court on the date set forth below.

☒ by mailing full, true and correct copies thereof in sealed, first class postage prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or attorneys, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.

☐ by causing full, true, and correct copies thereof to be hand-delivered to the parties and/or their attorneys at their last-known office addresses listed above on the date set forth below.

☐ by sending full, true, and correct copies thereof, via overnight courier in sealed, prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or their attorneys, on the date set forth below.

☐ by faxing full, true, and correct copies thereof to the fax machines which are the last-known fax numbers for the parties' and/or attorneys' offices, on the date set forth below.

DATED May 4th, 2017.

s/ David J. Elkanich  
David J. Elkanich